80-403

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1980

INTERSTATE COMMERCE COMMISSION

Respondent,

vs.

JAMES R. GOULD,
DOING BUSINESS AS BROKERS FOR
AGRICULTURAL COOPERATIVE ASSOCIATIONS,

Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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The petitioner, James R. Gould, doing business as Brokers for Agricultural Cooperative Associations, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of The United States Court of Appeals for the Third Circuit entered in these proceedings on June 30, 1980.

Questions Presented

1. Whether due process as guaranteed by the United States Constitution is violated where a court enforces an administrative demand to produce written records without a prior judicial or quasi-judicial determination by court, agency or third party of necessity or jurisdiction.

2. Whether the Interstate Commerce Act and Administrative Procedures Act require a quasi-judicial determination of necessity or jurisdiction prior to issuance of a records inspection request to an entity who has not voluntarily subjected itself to Interstate Commerce Commission jurisdiction.

Parties to the Proceedings Below

Defendant and petitioner in *ICC* v. *James R. Gould, doing business as Brokers for Agricultural Cooperative Associations* was James R. Gould, sole proprietor. The plaintiff and respondent was the Interstate Commerce Commission, a federal agency created under Title 49 of The United States Code.

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Current Codification	Interstate Commerce Act	Former Codification
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10321	§ 204(a)(7)	§ 304(a)(7)
11144(d)	§ 220(d)	§ 320(d)
11701	§ 204(c)	§ 304(c)
10321	§ 205	§ 305

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit, F2d (1980), Case #79-2256, is set forth in Appendix A hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 30, 1980. Timely petitions for rehearing were denied on July 23, 1980, this Petition for Certiorari was filed within 60 days of that period. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

Constitution of the United States of America; Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutes Involved

Title 49 United States Code 14(1)

> "Reports of investigations by commission— Whenever an investigation shall be made by said commission, it shall be its duty to make a report in

writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of the fact on which the award is made."

49 U.S.C. 204(a)

"Powers and duties generally. It shall be the duty of the Commission—

* * *

(6) To administer, execute and enforce all provisions of this part (§§ 201-205, 206-227 of this title), to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration, and

(7) For purposes of the administration of the provisions of this part (§§ 201-205, 206-227 of this title), to inquire into the management of the business of persons controlling, controlled by, or under common control with, motor carriers to the extent that the business of such persons is related to the management of the business of one or more motor carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted, and may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part (§§ 201-205, 206-227 of this title); and may transmit to Congress from time to time such recommendations including recommendations as to additional legislation as the Commission may deem necessary.

* * *

(c) Investigation of complaints—Orders. Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier

or broker has failed to comply with any provision of this part (§§ 201-205, 206-227 of this title), or with any requirement established pursuant thereto. If the Commission, *after notice and hearing* finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint." (Emphasis added).

49 U.S.C. 205(d)

"Oaths—Attendance of witnesses and production of documents. So far as may be necessary for the purposes of this part (§§ 201-205, 206-227 of this title), the Commission and the members and examiners thereof and joint boards shall have the same power to administer oaths, and require by subpoena the attendance and testimony of witnesses and the production of books, papers, tariffs, contracts, agreements, and documents, and to take testimony by deposition, relating to any matter under investigation, as the Commission has in a matter arising under part I (§§ 1-5, 5b-15a, 16, 17-23, 26, 27 of this title); and any person subpoenaed or testifying in connection with any matter under investigation under this part (§§ 201-205, 206-227 of this title) shall have the same rights, privileges, and immunities and be subject to the same duties, liabilities, and penalties as though such matter arose under part I."

49 U.S.C. 220(d)

"Forms of accounts, records and memoranda—Period of preservation—Inspection and examination. The Commission may, in its discretion, prescribe the forms of any and all accounts,

records, and memoranda to be kept by motor carriers, brokers, and lessors, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys; and it shall be unlawful for such carriers, brokers, and lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission may issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, correspondence, or documents of motor carriers, brokers, or lessors as may after a reasonable time be destroyed, and prescribing the length of time the same shall be reserved. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to and authority, under its order, to inspect and examine any and all lands, buildings, or equipment of motor carriers, brokers, and lessors; and shall have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents of such carriers, brokers, lessors, and associations as defined in this section, and such accounts, books, records, memoranda, correspondence, and other documents of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. Motor carriers, brokers, lessors, and persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and motor carriers, brokers, and lessors shall submit their lands, buildings, and equipment for examination and inspection to any duly authorized special agent, accountant, or examiner of the Commission upon demand and the display of proper credentials."

All other statutes of relevance to this cause are recited in Appendix I.

Statement of the Case

Your petitioner, Mr. James R. Gould, (hereinafter "Mr. Gould") operates a small sole proprietorship known as Brokers for Agricultual Cooperative Associations (hereinafter "B.A.C.A."). Mr. Gould is engaged in the business of brokering transportation services for carriers which are exempt from the jurisdiction of the Interstate Commerce Commission.[1] Therefore, Mr. Gould's activities are, per se, by the Interstate Commerce Commission's own regulations, exempt from jurisdiction[2] and unregulated.

Respondent, Interstate Commerce Commission (hereinafter "the Commission") is an independent administrative agency of the United States government charged with the responsibility of regulating interstate transportation of goods and commodities governed by its regulations as promulgated, within the limitations of the Interstate Commerce Act (hereinafter "the Act").

The Commission's Bureau of Investigation & Enforcement commenced an investigation of Mr. Gould, and its agents desire to use the Commission's power to examine records of a registered carrier or broker to inspect Mr. Gould's exempt records. This instead of the formal hearing and administrator subpoena route which Mr. Gould maintains is required by law. This matter was argued before the United States Court of Appeals for the Third Circuit on March 25, 1980. That Court, while upholding Mr. Gould's right to claim a Fifth Amendment privilege against self-incrimination did not recognize his Constitutional right, which is incorporated into the Interstate Commerce Act, and Administrative Procedures Act

1. Specifically, Mr. Gould arranges for the return trip use of trucks owned and operated by agricultural cooperatives, which, pursuant to the Act are exempt from the Commission's economic regulation and jurisdiction.

2. In Re P.D. Copes, Broker Application, 27 MCC154 (1940)

(hereinafter "APA"), and under the circumstances of this case, acts as an impenetrable bar against enforcement of the records request against Mr. Gould. The Fifth Amendment to the United States Constitution ascertains that Mr. Gould will "not be deprived of life, liberty, or property, without due process of law".

Just as the Fourth Amendment to the United States Constitution requires that administrative agencies obtain search warrants before proceeding with non-permissive visitorial inspections of business places, the Fourth and Fifth Amendments to the United States Constitution require a judicial or quasi-judicial due process determination by a court, third party or administrative agency as to agency jurisdiction and legal necessity to conduct an investigation, and Congress recognized this Constitutional requirement by incorporating due process safeguards into the Act and the APA.

Both the United States District Court for the Western Districts of Pennsylvania and the United States Court of Appeals for the Third Circuit did not review this requirement in their respective opinions, nor did they make any decision as to the need for such a determination by the agency. This fatal denial of Mr. Gould's Constitutional rights must result in reversal of the Court of Appeals and the District Court.

On October 5, 1977, allegedly pursuant to §220(d)[3] of the Act, agents of the Commission visited Mr. Gould's place of business and demanded to inspect his transportation

3. Statutory citation to the Interstate Commerce Act has been complicated by the recently completed recodification and reenactment of the Act (Public Law 95-473). References in this petition are to the old sections of the law which were in effect at initial intercourse between petitioner and respondent and when argument was held before the District and Appeals Courts. For convenience a table of references to the new sections of the Act is provided Id.

related records.[4] Mr. Gould refused to comply with this request because he is exempt from jurisdiction of the Commission, and the agents evidenced no authority subjecting him to their jurisdiction for purposes of records' inspection.[5] Thereafter, further communications and subsequent requests by the Commission to Mr. Gould were in accordance with neither the Act nor administrative regulations. The records requests were in an improper format; did not request the same information as was requested on October 5, 1977; did not state any reason for the request; and contained a variety of other defects. Throughout, Mr. Gould refused access to his records.

The Commission filed an injunctive action in the United States District Court for the Western District of Pennsylvania. This action sought to compel Mr. Gould to give the Commission access to his records.

4. Agents of the Commission made seven separate and different requests or demands for Mr. Gould's records (October 5, 1977; October 6, 1977; October 17, 1977; November 14, 1977; November 17, 1977; November 23, 1977; and November 29, 1977). The Commission petitioned the District Court for enforcement of the November 29, 1977, demand. Both the District and Court of Appeals have "enjoined" Mr. Gould from refusing to comply with the October 5, 1977, demand, which admittedly requested different records!

5. Throughout this Petition, we refer to the Commission actions as either a "request" or "demand" rather than as an administrative subpoena. At no time were the agents delegated authority or Commissioner grade personnel of the Commission involved in these "requests". The agents of the Commission, who were actually conducting the investigation of Mr. Gould, and who issued all of the requests were of the lower pay grades. They were not empowered by the Commission to issue administrative subpoenas for records. Functionally, the agents main job activity appears to be inspection of entities which have formally, in writing, subjected themselves to the Commission's jurisdiction.

It is admitted by both parties that the Commission issued no administrative subpoena, and a question before this Court is whether the Commission's records inspection power for registered entities (§220) may be applied to exempt sole proprietorships, or whether the Commission must use the more formal hearing/administrative subpoena methodology as provided in the Acts at §§204, 14.

In his answer, Mr. Gould raised separate defenses which fall into four broad categories:

1. Whether the Commission has jurisdiction to conduct this investigation and inspect Mr. Gould's records;

2. Whether the Commission's demands were made in bad faith and created an unreasonable burden upon Mr. Gould;

3. Whether the Commission has followed the procedure required by the Interstate Commerce Act, case law, and administrative regulations; and

4. Whether the Constitution shields Mr. Gould from disclosure of his records by virtue of the Fourth and Fifth Amendments to the United States Constitution.

The District Court granted Summary Judgment to the Commission first without a written opinion, and then, upon reconsideration, the Court prepared Findings of Facts and Conclusions of Law. Mr. Gould appealed. The Court of Appeals found that the October 5, 1977 inspection request by the Commission's agents was within the statutory jurisdiction and procedurally proper.[6] However, the Fifth Amendment issue raised by Mr. Gould required the Court to remand the case to the District Court for additional proceedings to determine whether Mr. Gould is qualified to

6. The Court of Appeals ignores the difference between the Commission's power to investigate for purposes of enforcing or administering the Act of (§204, 14) and its general power to monitor performance of a regulated entity by inspection of its records (§220) by reference to the Commission's general "power to investigate anyone who has information relevant to transportation related activities." See page 6 of Appeals Court Opinion. The Court is correct that this power exists, but a question here is whether it was employed within the limits of due process.

claim a Fifth Amendment privilege against self-incrimination, both because of his standing to claim the privilege and because of the character of the Commission's inspection process. That is, whether the process is more relative to a seizure under the Fourth Amendment or a subpoena of administrative records under the Fifth Amendment. The Court of Appeals concluded that if the records inspection were likened to a search and seizure, Mr. Gould had no defense; but if the inspection were compulsory, a Fifth Amendment privilege was permissive.[7]

This Petition for Certiorari demonstrates how a combination of errors in the District and Appeals Courts have denied Mr. Gould right to due process guaranteed by the United States Constitution.

In consideration of the injustice done Mr. Gould, the following facts are relevant:

1. On October 5, 1977, until the last visitorial contact by Interstate Commerce agents on November 29, 1977, Mr. Gould had not received an administrative subpoena for his records as either authorized by §§14, 204, 205 of the Act, or signed by a person having authority under the Act to issue administrative subpoenas. Coincidently, the persons making the records requests of Mr. Gould and signing the requests were agents of the Commission actively involved in the investigation. No quasi judicial determination or, for that matter, third party determination was made of Mr. Gould's legal obligation to supply the records. Instead, the Commission chose to rely with the Court's indulgence upon its power to inspect records of regulated entity and for the

7. The Court of Appeals determined that the summary procedures of the Commission met due process requirements, but sees no requirement of a prior judicial or quasi-judicial determination of necessity for a search warrant as required by *Marshall* v. *Barlows* 436 U.S. 307 (1978). Whether a summary procedure by an adversary party satisifies due process where a third party determination procedure is provided by the Act is a question which this Court must consider.

first time ever of record, used that power to obtain records from a non-regulated entity.

2. Mr. Gould had never subjected himself to the jurisdiction of the Interstate Commerce Commission.

3. Mr. Gould was patently engaged in an unregulated business under the decisions of the Commission's own administrative law tribunal. He never claimed to be a regulated entity, nor to this day has the Commission produced any fact indicating that he is a regulated entity. Nor has the Commission determined Mr. Gould subject to its jurisdiction for any purpose by an administrative process.

4. The Commission's stated purpose in conducting this investigation is to determine its jurisdiction over Mr. Gould, yet its agents admitted that an element of the investigation was criminal.

5. If the inspection procedures used by the Commission are searches and seizures as defined by the Fourth Amendment to the United States Constitution, Mr. Gould was never served with a search warrant, and the Commission should be enjoined from any further proceedings until such time as it demonstrated to an unbiased party that it possessed reasonable grounds and authority to obtain a search warrant and conduct an inspection of Mr. Gould's records—an inquiry not made by the District or Appeals Courts. If, on the other hand, the investigative techniques of the Interstate Commerce Commission are of a subpoena nature, Mr. Gould is protected by the Fifth Amendment because he has not subjected himself to the agency. He is due an unbiased determination accorded entities to be investigated by the Commission, and not the summary methods used on those waiving their rights to due process

by coming voluntarily under the Commission's jurisdiction.

Reasons for Granting the Writ

I. The Court of Appeals Decision Violates Due Process Because It Allows an Administrative Agency of the Federal Government to Conduct a Summary Investigation of an Entity Over Which It Has No Jurisdiction Without a Prior Determination of Jurisdiction, or Necessity.

The due process clause embodies a system of moral and legal principles deeply embedded into our traditions and legal precedent as to what is fair, right, and just under our system of government. Justice Frankfurter summarized the concept in *Joint Anti-Fascist Refugee Committee* vs. *McGraw,* 341 U.S. 123 (1951):

> "Due process represents a profound attitude of fairness between man and man, and more particularly between the individual and government, due process is compounded of history, reason, the past course decisions, and stout confidence in the strength of democratic faith which we profess. Due process is not a mechanical instrument. It is not a yard stick. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

One of the most fundamental concepts of due process is that of a fair hearing. This concept originally evolved as a judicial hearing before a tribunal which at least meets the then currently prevailing standards of impartiality. As the concept continues to evolve, it has been held that those who are brought into contest with the government in quasi-judicial proceedings aimed at control of their activities are

entitled to be fairly advised of what the government proposes and to be heard upon the proposal before the final command is issued. *Morgan* vs. *United States,* 304 U.S. 1 (1938); *United States* vs. *Nugent,* 346 U.S. 1 (1953).

The Interstate Commerce Commission was the first independent regulatory agency created by Congress. It was created in an atmosphere of distrust of agencies. The conservative courts of the era sought to maximize rights of individuals in contest with government agencies. The courts adopted the position that the validity of an administrative order depended upon whether the impact or total effect of the order is just and reasonable. *Faith* vs. *Equity Gas Company,* 320 U.S. 591 (1944).

In application of these principles of fundamental fairness to the investigative process, the court has traditionally limited its decisions to requiring search warrants in most instances of search and seizure and prohibiting self-incrimination. Nevertheless, fundamental principles of applying due process to a requirement of agency fairness in conducting an investigation have remained the same:

1. An administrative agency has expertise in the given area assigned it by Congress, and it should first have the opportunity to determine jurisdiction, legitimacy, and any other matter within the expertise of the agency.

2. In making the administrative determination, the administrative agency must accord the due process as is traditionally applied within the legal morals of our society.

3. Such an application of legal morals implies an unbiased determination by a third party. The third party may be an administrative law judge in the employ of the agency, or a non-employee who is capable of making an unbiased decision if the evidence is presented by adversarial groups.

4. Once the due process determination is made, the Courts may not inquire further into jurisdiction, necessity, or other matters except in instances of grievous abuse. However, it is implied that the court must satisfy itself of a due process determination being made, and if it was not, refuse to lend support to the agency's activity.

Both the District and Appeals Courts erred in accepting the facial requirement that a federal court only inquire into the lawful function of the agency being implemented by its investigation per *Endicott Johnson Corp.* vs. *Perkins* 317 U.S. 501. Due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews* vs. *Eldridge* 424 U.S. 319 (1976). The most meaningful time for Mr. Gould was when the agency made its decision to investigate. The Courts' error is in the failure to inquire as to the mechanism used by the agency in conduct of its quest. In Mr. Gould's case, the agency made no official determination. That was the denial of due process which the Courts should have detected, and accordingly remanded the matter to the agency for a determination of its jurisdiction, production of a record, and application of the principles of due process.

Without this determination, Mr. Gould is denied due process because the agency has made no determination of its right or jurisdiction, and under the Decisions of the Supreme Court, the District and Appeals Courts are precluded from any second guessing of the agency so they can make no determination.

Summary Judgment as granted by the District Court precluded any precise determination of the governmental function and private interests which will be affected by the governmental actions. Both Mr. Gould's freedom (liberty) and business activity (property) interests have been seriously affected by the Commission's actions. Yet no court even considered the balance of requiring a safeguard

of the government, even though such a safeguard was provided in the Act.

Mr. Gould, and anyone else engaged in a similar business, is now subjected to a summary procedure which offers no opportunity for hearing, and at the whim of the Commission's junior employees causes great expense and burden on the unregulated entity. This is not only bad law, but also bad administration by the government which should desire to exercise greater control over its employees' actions.

II. The Interstate Commerce Act and the Administrative Procedures Act Require an Administrative Agency or a Third Party to Make a Judicial or Quasi Judicial Determination of Necessity or Jurisdiction Before Demanding Records of an Entity Which Claims That it is Exempt from Jurisdiction.

It has often been said that when an administrative agency seeks the assistance of a Federal Court in enforcing an administrative subpoena, the agency need only demonstrate that the investigation for which it requires the information is for a lawfully authorized purpose within the power of Congress to command and that the documents sought are reasonably relevant to the inquiry. Yet, the United States Constitution and the United States Congress in both the *Interstate Commerce Act* and the *Administrative Procedures Act* imply a third obligation of a Federal Court. Section 555(c) of the *Administrative Procedures Act* requires: "process, requirement of report, inspection, or other investigative act or demand may not be issued, made, or forced except as authorized by law."

What does the phrase "authorized by law" mean? The law of the United States implies that when a federal agency is conducting an adversarial activity with a citizen

of the United States as an adverse party, it must conduct the activity within the bounds of fundamental fairness and due process.

The historical record of the *Administrative Procedures Act* shows that Congress intended that the federal courts do more than required by *Endicott Johnson* and *Oklhoma Press.* Congress incorporated the language in Section 555(d) of the Administrative Procedures Act:

> "Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain it, the subpoena, or similar process or demand to the extent that it is found to be in accordance with law."

Congressman Walker, who sponsored the bill in the House of Representatives, commented on the phrase "in accordance with law" in Senate Document 248, Seventy-ninth Congress, Second Session, page 363 (1946):

> "The term 'in accordance with law' . . . means the legal situation, including the necessary facts, demonstrates that the persons and subject matter to which the subpoena is directed are within the jurisdiction of the agency which has issued the subpoena."

Congressman Walker later said that the effect of the provision was to do more than merely restate the existing Constitutional safeguards incorporated in *Endicott Johnson* vs. *Perkins* and *Oklahoma Press* vs. *Walling* cases.

Although it has been held many times that the phrase "in accordance with law" does not give the court authority to determine the agency's jurisdiction over the individual from whom the information is subpoenaed, *Tobin* vs. *Banks & Rumbaugh,* 201 Fed 2d 223 (Fifth Circuit, 1953), the

Court clearly has the opportunity to look within the administrative mesh to determine that due process has been granted the subpoenaed individual by the administrative agency. See, for example, *Longbeach Federal Savings & Loan Association* vs. *Federal Home Loan Bank Board,* 189 Fed Supp. 589 (D.C., California, 1960).

While Congress has entrusted an administrative agency with broad control over activities which because of their detail cannot be dealt with directly by the Legislature, Congress must determine the standards of administrative action, and in administrative proceedings, the quasi judicial character which will be employed in carrying out such authority and to protect the liberty and property of citizens in accordance with the principles of due process. *Morgan* vs. *United States,* 304 U.S. 1 (1938). In enacting the Interstate Commerce Act, Congress did just this.

Section 204 of the Act outlined the general duties and powers of the Commission. These powers included the power for purposes of administering the provisions of the Act (Sections 201 through 227) to inquire into the management of the business of motor carriers and brokers and other entities and to obtain such information the Commission deems necessary in order to carry out the provisions of the Act. Congress further provided at Section (c) of Section 204 that if the Commission, after *notice and hearing,* finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith.

Finally, Congress sought to apply due process to all actions of the Commission undertaken under Section 204 of the Act. In Section (d) of Section 204, the provisions of Section 14 of Part 1 of the Act relating to reports, decisions,

schedules, contracts, and other public records were made to apply in the administration of Sections 201-227 of the Title.

It is patently clear that Congress did not intend the Commission's power to investigate under Section 204 and to subpoena investigative information under Section 205 to be conjunctive with the Commission's power to inquire and examine business records under Section 220. Neither Section 204 nor 205 is designed to facilitate Section 220(d) inspection of records. Section 220(d) is expressly limited to entities subject to the jurisdiction of the Commission. The Commission, by its own administrative law decision at *In Re P. D. Copes,* super, excluded brokers such as Mr. Gould from the definitional basis for regulation set forth in Section 203 of the Act. It is apparent, therefore, that Section 220 is not applicable to Mr. Gould. Since this Section of the Act is the basis for the Commission's case first filed in the District Court, it is clear that this argument is illusory. The Commission's case must fail on the merits because Section 220 obviously does not apply to Mr. Gould as a non-regulated broker.

If, instead, the Commission intends to rely upon its general investigatory powers made available under Sections 204 and 205, it must, in accordance with the Interstate Commerce Act, apply those limitations of Section 14 of the Act to secure a properly issued administrative subpoena which requires Mr. Gould to present the records to the Commission. This the Commission has not done.

Conclusion

For the foregoing reasons, a Writ of Certiorari should issue, and the Judgment of the United States Court of Appeals for the Third Circuit should be reversed. This cause should be remanded to the Interstate Commerce Commission for further proceedings which are designed to

implement the due process consideration due Mr. Gould under the Fifth Amendment to the United States Constitution, the Interstate Commerce Act, and the Administrative Procedures Act.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2556

INTERSTATE COMMERCE COMMISSION, *Appellee*

v.

JAMES R. GOULD,
doing business as
BROKERS FOR AGRICULTURAL COOPERATIVE
ASSOCIATIONS, *Appellant*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 78-0220)

Argued March 25, 1980

Before: ROSENN, GARTH and SLOVITER, *Circuit Judges*

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OPINION OF THE COURT

(FILED JUN 30 1980)

GARTH, *Circuit Judge*.

This is an appeal from an order of the district court which granted summary judgment in favor of the Interstate Commerce Commission (ICC) on its petition to require James Gould to allow ICC agents access to his business records. We conclude that the ICC possesses statutory authority to examine Gould's records. Nevertheless, Gould has raised a substantial question regarding the protection afforded him by the fifth amendment, and we therefore remand this case to the district court for further proceedings.

I.

Gould does business in the form of a sole proprietorship, Brokers for Agricultural Cooperative Associations (BACA). ICC agents visited the BACA office on October 5, 1977 and, pursuant to section 220(d) of the Interstate Commerce Act (ICA), 49 U.S.C.A. §11144(b) (West

Supp. 1980),[1] demanded to inspect BACA's transportation-related records. Gould refused to comply with the agents' request. After further communications, the ICC on a number of occasions again requested access to BACA's records. These requests were made pursuant to section 11144(b), as well as ICA §220(g), 49 U.S.C.A. §11144(c) (West Supp. 1980).[2] Gould consistently refused to permit access to his records.

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1. Section 11144(b) provides:

> The Commission, or an employee designated by the Commission, may on demand and display of proper credentials —
>
> (1) inspect and examine the lands, buildings, and equipment of a carrier, broker, or lessor; and
>
> (2) inspect and copy any record of —
>
> (A) a carrier, broker, lessor, or association;
>
> (B) a person controlling, controlled by, or under common control with a carrier if the Commission considers inspection relevant to that person's relation to, or transaction with, that carrier; and
>
> (C) a person furnishing cars or protective service against heat or cold to or for a rail or express carrier if the Commission prescribed the form of that record.

Statutory citation in this area has been considerably complicated by the recent complete revision, recodification, and reenactment of the Interstate Commerce Act, Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337-(1978). In the interest of conforming to the congressional intent seeking to streamline the language and structure of the Act, we will cite statutory provisions to their new section numbers in the United States Code Annotated, since the new codification has not yet appeared in the United States Code. For the sake of convenience, a table of approximate cross-references is included as an appendix to this opinion.

2. Section 11144(c) provides:

> The Commission, or an employee designated by the Commission, may, during normal business hours, inspect and copy any record related to motor vehicle transportation of a cooperative association or federation of cooperative associations required to notify the Commission under section 10526(a)(5) of this title. However, the Commission may not prescribe the form

The ICC then filed an action in the District Court for the District of Western Pennsylvania. This action sought an injunction which would compel Gould to grant the ICC access to BACA's records. The court's jurisdiction was invoked pursuant to ICA §§204(a)(6), 220(d), 222(b)(1), 49 U.S.C.A. §§10321(c)(3), 11144(b), 11702(a)(4) (West Supp. 1980).[3] In his submissions, Gould admitted to doing business as BACA, App. at 15 (answer); that he believed that the ICC was investigating him, *id.* at 15-16; that the ICC had requested access to his records a number of times, *id.* at 16; and that he had refused to comply with those requests, *id.* at 17. He also admitted paragraphs 4 and 5 of the ICC complaint, which state:

> 4. Pursuant to this investigation, on or about October 5, 1977, Agents Martin P. Monaghan, Jr., and John Sopko, duly authorized agents of the Commission, appeared at the defendant's place of business and, after proper display of credentials, made a formal oral demand for access to those

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NOTE 2 — *(Continued)*

of records to be maintained by a cooperative association or federation of cooperative associations.

The request under this section was predicated upon BACA's serving as an agent for Harvest Moon Farm Lines, Inc., an agricultural cooperative registered with the ICC. Gould advised the ICC that his agency relationship had been terminated and that he had not retained any records pertaining to Harvest Moon. The ICC did not press this request, and it is not a subject of this appeal.

3. 49 U.S.C.A. §10321 (West Supp. 1980) specifies generally the powers of the ICC, and includes the power to conduct far-reaching investigations and to subpoena witnesses and records. *Id.* §10321(c)(1). Subsection (c)(3) gives the district courts the power to enforce such subpoenas.

Section §11702(a)(4) gives the ICC the authority to bring a civil action, *inter alia*, to enforce any provision of the ICA except provisions "governing the reasonableness and discriminatory character of rates."

transportation-related records and documents maintained by the defendant in the course of his interstate transportation operations under the name of BACA. Said demand was refused by the defendant, James R. Gould.

5. Defendant was re-contacted by Agent Monaghan, on or about October 6, 1977, and at this time Agent Monaghan again requested access to the transportation-related records and documents maintained by the defendant. Said demand was once again refused by the defendant, James R. Gould.

Id. at 6.

In his answer, Gould also raised as separate defenses the ICC's lack of jurisdiction over BACA, that the ICC's request for records was made in bad faith,[4] and that the records were shielded from ICC view by the fourth and fifth amendments.[5] The ICC moved for summary judgment, which was granted.[6]

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4. This includes Gould's claims that the ICC wanted the records for an improper purpose, that the ICC had failed to follow the necessary administrative steps, and that the ICC request was too indefinite.

5. Other defenses included assertions that the ICC had other means of obtaining the information, that other parties would have to be joined to have their rights protected, and that the inspection would be unduly burdensome to Gould.

6. On April 12, 1979, after additional time had been accorded Gould for further discovery, the district court entered summary judgment in favor of the ICC permanently enjoining Gould from refusing to produce BACA's records. Following additional motions made by Gould, which resulted in rehearing, the district court entered its order dated September 7, 1979, which was filed on September 11, 1979 and which affirmed its earlier disposition. Hereafter this order will be referred to as the September 11, 1979 order. Thereafter the district court stayed the operation of its order pending disposition on appeal.

The issues presented in this appeal fall into three broad categories: first, whether the ICC has jurisdiction to conduct its investigation and thus obtain inspection of Gould's papers; second, whether the ICC has followed the procedures required by statute and case law; and, third, whether the Constitution nevertheless shields Gould's records from disclosure. It is to the first category which we now turn.

II.

The dispute over the ICC's statutory jurisdiction under section 11144(b) to "inspect and copy any record of a . . . broker" poses the question as to whether the ICC has jurisdiction to determine its own jurisdiction. Gould contends that he and BACA are exempt from ICC regulation and has denied that BACA's operations are in any way subject to ICC jurisdiction. Gould argues that section 11144(b) applies only where a business has consented to ICC regulation or has been adjudicated to be subject to ICC jurisdiction. Gould maintains that the ICC may investigate BACA's activities only by resorting to the more cumbersome procedures of ICA §§204, 205, 49 U.S.C.A. §10321 (West Supp. 1980). Section 10321 extends the ICC's investigative power to anyone who has information relevant to a transportation-related inquiry, *see Comet Electronics, Inc. v. United States*, 381 F. Supp. 1233, 1237-40 (W.D. Mo. 1974), *aff'd mem.*, 420 U.S. 999 (1975); note 3 *supra*.[7]

The ICC, on the other hand, argues that the section 10321 general investigatory power and the section 11144(b) inspection power are equally available alternatives where the person or entity the ICC seeks to inspect arguably falls within ICC jurisdiction. The ICC points

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7. Under §10321, there is no provision for summary enforcement, and subpoenas that are issued must be authorized only by certain ICC officials.

out that it must first inspect Gould's BACA records to determine whether or not Gould has subjected himself to ICC jurisdiction either by the nature of his business or by his business dealings:

> The purpose of the Commission's inquiry is to determine whether or not the defendant is subject to the provisions of the Interstate Commerce Act, and if so, whether the defendant is in violation of any of the provisions thereof.

App. at 170 (answer to interrogatory).

We find the ICC's argument persuasive. Section 10321 explicitly states, "Enumeration of a power of the Commission in this subtitle does not exclude another power the Commission may have in carrying out this subtitle." This disclaimer belies Gould's claim that section 10321 is in any way exclusive. Moreover, the cases that have examined analogous issues of jurisdiction of other agencies have consistently accorded broad latitude to the agencies' powers, including "jurisdiction to determine jurisdiction" by summary procedures.

First, it is clear that regulatory agencies may inspect records on summary proceedings without any showing of probable cause. *See, e.g., United States v. Powell*, 379 U.S. 48, 53-54 (1964) (Internal Revenue Service). All that is necessary is that the "information sought [be] reasonably relevant," *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (Federal Trade Commission).

Second, the Supreme Court held in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), that under the Fair Labor Standards Act provision giving the Secretary of Labor the authority to subpoena records summarily, 29 U.S.C. §209, it was for the Secretary, in the first instance, to determine, by inspecting the records if necessary, whether the particular business was covered by the Act. *See* 327 U.S. at 209-14. The Court distinguished those situations requiring probable

cause, as in the case of a warrant, from situations, like the one presented there, where the investigation was "for a lawfully authorized purpose, within the power of Congress to command," *id.* at 209, and where "the documents sought are relevant to the [agency's] inquiry," *id.* It was in this context that the Court defined the Administrator's subpoena power and the right of summary enforcement. The Court said:

> We think, therefore, that the courts of appeals were correct in the view that Congress has authorized the Administrator, rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence on that question, by seeking the production of petitioner's relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the district courts in enforcing it.

Id. at 214; *see Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-09 (1943) (Walsh-Healey Public Contracts Act, 41 U.S.C. §§35-45). The courts of appeals have followed the same analysis in construing the subpoena power[8] of other agencies. In *SEC v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047 (2d Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), the Second Circuit wrote:

> Appellants argue, therefore, that before the Commission can subpoena information from them, the Commission must demonstrate that there is "rea-

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8. The subpoenas to which we refer in the cases cited in text are the equivalent of the ICC's statutory power under §11144(b) to inspect records where there is a legitimate and relevant subject of inquiry. *See* Midwest Growers Co-op. Corp. v. Kirkemo, 533 F.2d 455, 461 (9th Cir. 1976).

sonable, factual cause for a belief that the sales made by these three [appellants] may constitute the sale of 'securities' or 'investment contracts' within the meaning of Section 2(1) of the Securities Act." In particular, they urge that the district court must make some initial determination as to statutory coverage and that the fourth amendment's "probable cause" requirement demands that the Commission show enough facts to demonstrate that "reasonable grounds" exist for issuing subpoenas to appellants and compelling the production of documents.

Appellants raise serious questions about whether their activities are subject to regulation by the SEC. Should the Commission seek to exercise regulatory contol over appellants' business affairs at some future date, whether by means of a section 5 injunctive suit or otherwise, appellants will be entitled to a full hearing on their contentions. However, it has long been settled that such issues are not to be decided in subpoena enforcement actions. *The Commission must be free without undue interference or delay to conduct an investigation which will adequately develop a factual basis for a determination as to whether particular activities come within the Commission's regulatory authority.*

In 1946 in Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), a case involving the administration of the Fair Labor Standards Act, 52 Stat. 1060, the Supreme Court stated what has since become the rule for interpreting regulatory statutes; namely, that *it is for the agency rather than the district courts to determine in the first instance the question of coverage in the course of the preliminary investigation into possible violations.* 327 U.S. at 214, 66 S.Ct. at 508. See Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 63 S.Ct. 339, 87 L.Ed. 424 (1943).

480 F.2d at 1052-53 (footnotes omitted) (emphasis supplied);[9] *accord, Sec v. Howatt*, 525 F.2d 226, 229-30 (1st Cir. 1975); *SEC v. Savage*, 513 F.2d 188, 189 (7th Cir. 1975) (per curiam). The same result obtains with respect to the Federal Trade Commission's subpoenas. In *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir.) (en banc), *cert. denied*, 431 U.S. 974 (1977), the District of Columbia Circuit wrote:

> As a general rule, substantive issues which may be raised in defense against an administrative complaint are premature in an enforcement proceeding. The controlling case again is *Endicott Johnson*, where the Court stated that the petitioner has "advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena." 317 U.S. at 509, 63 S.Ct. at 343 (footnote omitted). Moreover, in holding that an administrative subpoena must be enforced if the information is relevant to a lawful purpose of the agency, and not unduly indefinite or unreasonably burdensome, the Supreme Court has clearly rejected other defenses. The reasons for this rule are obvious. If parties under investigation could contest substantive issues in an enforcement proceeding, when the agency lacks the information to establish its case, administrative investigations would be foreclosed or at least substantially delayed. As the Court stated in *Oklahoma Press*,
>
> > [P]etitioners' view, if accepted, would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the

9. *See* 480 F.2d at 1053-54 (historical background); *id.* at 1055 (SEC "is entitled to conduct a full inquiry into both potential coverage and potential violations").

> case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. 327 U.S. at 213, 66 S.Ct. at 508.

No substantive rights are negated by the restriction, for if a formal complaint is issued, subpoenaed parties may assert their defenses in the subsequent administrative proceeding. Further, the agency's final decision in that adjudicatory proceeding is reviewable by a court of appeals.

These principles have consistently been applied when jurisdictional defenses have been raised in enforcement proceedings. Two recent cases are illustrative. In *FMC v. Port of Seattle*, the Ninth Circuit held that the district court erred in limiting enforcement of Maritime Commission discovery orders to only those facts necessary to determine the Commission's jurisdiction to investigate the Port's consolidation services and in refusing to permit the Commission to inquire into the "details" of the consolidation services. 521 F.2d 431, 433-436 (1975). Similarly, the Seventh Circuit held in *SEC v. Savage* that the Commission was not required to establish its jurisdiction by demonstrating that a company's commodities future contracts were "securities" within the meaning of the Securities Act before the subpoena would be enforced. 513 F.2d 188, 189 (1975). The court emphasized that the company "would require SEC to answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." Id.

555 F.2d at 879 (footnotes omitted); *accord, FTC v. Swanson*, 560 F.2d 1, 1-2 (1st Cir. 1977) (per curiam)

(inappropriate, in subpoena enforcement proceeding, to litigate question of whether there could possibly be a legitimate purpose to subpoena if, as target claimed, it was beyond FTC jurisdiction); *FTC v. Gibson*, 460 F.2d 605, 608 (5th Cir. 1972).

Although the agencies' governing statutes construed in these cases necessarily differ in some respects from the Interstate Commerce Act, we do not find that any such differences dictate a dissimilar result in the present case. The ICC's summary inspection authority, first granted in 1935 when jurisdiction of the ICC was established over the trucking industry,[10] is the analogue of the authority granted to other agencies to issue subpoenas enforceable by court order. *Midwest Growers Co-op. Corp. v. Kirkemo*, 533 F.2d 455, 461 (9th Cir. 1976).[11] In every situation, the issue of the agency's jurisdiction and the answer are the same. As long as the agency arguably has jurisdiction to inspect, questions of jurisdiction — such as whether the business was in fact engaged in interstate commerce, or whether the docu-

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10. Motor Carrier Act, 1935, ch. 498, 49 Stat. 543, 563 (1936).

11. We note that when Congress extended the ICC's inspection power to the records of agricultural cooperatives, it neglected to include agricultural cooperatives as parties against whom the ICC could secure injunctions to enforce inspection requests, even though it included agricultural cooperatives as parties whose records could be inspected. Nor was this omission corrected by §11702(a)(4) in the 1978 reenactment of the ICA, *see* notes 1 & 3 *supra*. Nevertheless, we agree with those courts that have held that the omission was an oversight and that a court of equity in any event has inherent power to enforce by injunctive order the ICC's "right" to inspect the records, lest the ICC be left with a right without a remedy. ICC v. Beehive State Agricultural Coop., Inc., 575 F.2d 802, 804 (10th Cir. 1978); *Midwest Growers*, 533 F.2d at 461; ICC v. Big Valley Growers Co-op, 493 F.2d 888, 891 (9th Cir. 1974).

This issue is not presented directly in this appeal because Gould has challenged the ICC's very right to inspect, not its right to obtain an injunction to enforce its inspection. Moreover, this record does not disclose whether in fact BACA is an agricultural cooperative.

ments traded were "securities," or whether the business has engaged in regulated transportation activities — are to be determined in the first instance by summary inspection procedures and need not be first litigated in court.[12]

An examination of the record of this case reveals that at no time did Gould ever deny that he had transportation-related records. Far from denying possession of records or denying that his business was not involved in transportation of agricultural commodities, Gould in his brief at 2 described his business as "a sole proprietorship engaged in the business of brokering transportation services for carriers exempt from the jurisdiction of the Interstate Commerce Commission," but claimed that he was exempt from ICC regulation.[13] Rather, his consistent position has been that he has refused to provide any such transportation-related records and documents to the ICC even though negotiations looking toward access to the records by the ICC have been conducted. In this posture of the record, and giving credit to the argument made by Gould *not* that he had no such records, but rather that the ICC should obtain them elsewhere or by use of different procedures, it is apparent that the ICC has ample justification to believe that Gould and BACA have engaged in a transportation-related business, whose activities might arguably fall within the ICC's jurisdiction. We therefore hold that the ICC had statutory jurisdiction to inspect Gould's BACA records through the summary provisions of section 11144(b) and to seek an injunction to compel Gould to permit the inspection.

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12. *See generally*, 1 K.C. Davis, Administrative Law Treatise §4:6 (2d ed. 1978).

13. We need not discuss, and thus reserve, the situation where an individual or business denies possession of the records sought, inasmuch as that issue is not presented by this record.

III.

A.

The next issue which we must examine is whether the ICC has conformed to the procedures established by statute and case law. As we understand Gould's contention, it is that even if a right of summary inspection is authorized by law, the agents who visited Gould did not comply with mandated procedures so as to permit enforcement. We cannot agree.

The record reveals that at least as to the visit on October 5, 1977, the ICC agents complied with the express procedural requirements of section 11144(b). Paragraph 4 of the ICC's verified complaint states:

> Pursuant to this investigation, on or about October 5, 1977, Agents Martin P. Monaghan, Jr., and John Sopko, duly authorized agents of the Commission, appeared at the defendant's place of business and, after proper display of credentials, made a formal oral demand for access to those transportation-related records and documents maintained by the defendant in the course of his interstate transportation operations under the name of BACA. Said demand was refused by the defendant, James R. Gould.

App. at 6. Gould admitted these allegations in his verified answer, *id.* at 16. Thereafter he filed an affidavit in which he reaffirmed the statements contained in his verified answer, *id.* at 109.[14] While subsequent actions

14. We are puzzled by the position taken in Gould's brief, which apparently contradicts the admission made by Gould's answer and in his affidavit, to which we have referred in text above. Gould's brief at 15 states that the facts contained in findings 5, 6, and 7 of district court, App. at 79, are controverted by the parties. Yet, the district court's findings 5, 6, and 7 do no more than summarize the allegations of paragraph 4 of the ICC's complaint, which allegations were admitted by Gould. While findings of fact are obvi-

of the agents, the ICC, and Gould are interpreted differently by the parties as they pertain to the ICC's demand and "negotiation" for records, there is, as we have pointed out, no material factual dispute with respect to the actions of the agents on the October 5, 1977 visit. Thus, Gould's claim that the agents violated the procedural requirements of section 11144(b) must fail.

B.

Another aspect of Gould's argument in which he contends that the ICC did not comply with appropriate procedures, is his allegation that the ICC has an improper purpose in seeking to inspect his records. Gould argues that the ICC is attempting to gather information for a criminal investigation and that such a purpose is illegal and cannot support the inspection sought.

1.

The ICC's power to inspect records under the authority of section 11144(b) is limited by the same standards of "reasonableness" as apply to other agencies' subpoena power. *See Midwest*, 533 F.2d at 461; *Cooper's Express, Inc. v. ICC*, 330 F.2d 338, 341 (1st Cir. 1964). *Cooper's* stated:

> The statute in question [the predecessor of section 11144(b)] grants the Commission a broad power of inspection commensurate with its broad power of regulation of carriers engaged in interstate commerce. It could not properly perform its duties if the regulated party had the right to say just how far an examination could go. . . . The Commission itself is limited by the standard of reasonableness. The inspection must be related to the Commission's func-

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ously not compatible with a summary judgment disposition, *see* note 24 *infra*, it nevertheless appears that Gould's brief does not accurately represent Gould's sworn admissions.

> tion as a regulator of motor carriers in interstate commerce. Of course "[i]n view of the broad power of regulation of interstate public carriers, it is difficult to conceive of a case in which the Interstate Commerce Commission would be seeking to inspect a record or document which would not be relevant to a lawful activity of the Commission. We assume, however, that if such a case were presented, the right to require production of a record or document would be denied."

id. (citations omitted).

Subsequent developments, however, have further delimited the meaning of "reasonableness." In the context of Internal Revenue Service summonses, the Supreme Court has held that the Service has the initial burden of proving a *prima facie* case of "good faith." *United States v. LaSalle National Bank*, 437 U.S. 298 (1977); *United States v. Powell, supra*. We have recently explained this requirement and its attendant procedures in *United States v. Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979):

> *LaSalle* defined "good faith" in this context both affirmatively and negatively. In its affirmative definition, *LaSalle* referred to the four prongs of the *prima facie* showing of "good faith" as explicated in *United States v. Powell*, 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), namely:
>
> > (1) that the investigation is being conducted for a legitimate purpose (*i.e.*, that the I.R.S. retains an interest in civil tax collection);
> >
> > (2) that the material sought is relevant to the legitimate purpose of the investigation;
> >
> > (3) that the information is not yet in the possession of the I.R.S.; and

> (4) that the proper administrative steps have been followed.
>
> It is the Government's burden to satisfy all four prongs of the *Powell* test. *Id.* at 57, 85 S.Ct. 248. The requisite showing is generally made by affidavit of the agent who issued the summons and who is seeking enforcement. *United States v. McCarthy*, 514 F.2d 368, 372 (3d Cir. 1975). "[T]he purpose of the good-faith inquiry is to determine whether the agency is honestly pursuing the goals of [I.R.C.] §7602 by issuing the summons." *LaSalle*, 437 U.S. at 316, 98 S.Ct. at 2367. Those goals may be summarized as (1) ascertaining the correctness of a return, (2) making a return where none has been made, (3) determining tax liability, and (4) collecting taxes. *LaSalle* cautions that the I.R.S. "at all times must use the summons authority in good-faith pursuit of [these] congressionally authorized purposes," *id.* at 318, 98 S.Ct. at 2368.

607 F.2d at 67-68; *see United States v. First National State Bank*, 616 F.2d 668, 670-73 (3d Cir. 1980).

The Supreme Court, in establishing the *LaSalle* guidelines, addressed the concerns of Congress in preventing and prosecuting tax fraud. It was in that context that the Supreme Court drew the line between civil tax collection processes and criminal tax proceedings insofar as powers of the Internal Revenue Service were concerned. Thus, the Internal Revenue Service is entitled to use its summons power and to obtain judicial enforcement of its summonses in order to pursue the civil aspects of tax collection. However, it is an abuse of this power to use it solely to gather evidence for a *criminal* tax fraud prosecution, as such prosecutions are within the purview of the Justice Department and the grand jury — not the Internal Revenue Service.

It appears to us that the congressional approach to the regulation of commerce is similarly structured. The ICA provides that the ICC may bring only civil actions, while the Justice Department may bring criminal prosecutions as well. *Compare* 49 U.S.C.A. §11702 (West Supp. 1980) (civil actions) *with id.* §11703 (criminal and derivative civil proceedings).[15] To enforce an ICC inspection request made solely in order to gather evidence for a criminal prosecution would be as much of an abuse of judicial process under the ICA as it would be if a tax investigation did not qualify under the *LaSalle-Garden State* principles. We therefore hold that in order to obtain an injunction under section 11702(a)(4) to enforce a section 11144(b) inspection request, the ICC, in addition to meeting the procedural requirements of section 11144(b), must also satisfy the tests of *Powell, LaSalle*, and *Garden State*.[16]

2.

We recognize that the ICC was not required by the district court to submit *Powell* affidavits. However, the ICC did answer Gould's interrogatories under oath, Fed. R. Civ. P. 33, and its sworn answers clearly reveal that

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15. The Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101 (1978) (codified at 5 U.S.C.A. app. I (West Supp. 1980)), created inspectors general in a number of executive agencies, including the Departments of Commerce and Transportation. This Act is not implicated on this appeal.

16. *See generally Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1329-30 (1979) [hereinafter cited as *Developments*] (suggesting application of *LaSalle* to all agencies); Note, *The Institutional Bad Faith Defense to the Enforcement of IRS Summonses*, 80 Colum. L. Rev. 621, 625 n.29 (1980) (noting applicability of *LaSalle* to Securities and Exchange Commission and to National Labor Relations Board but suggesting that *LaSalle* should not apply where an agency's summons power contemplates criminal investigations).

the four-pronged *Powell* test has been met. The answers demonstrate the following:

(1) The purpose of the ICC inquiry is to determine whether or not Gould is subject to the ICA and if so, whether he violated it. App. at 170.

(2) The inquiry began in September 1977. *Id.*

(3) The necessary records are:

> BACA invoices or freight bills, receipts or bills of lading, record of payment by shippers, record of payment to underlying truck owner or lessee, equipment leases, dispatch records, records of any inquiries to agricultural cooperatives regarding their legitimacy, written agreements between the defendant and the agricultural cooperatives.

Id. at 173.

(4) These records are relevant to the inquiry:

> in that they will allow the Commission to determine whether or not the activities of the defendant are subject to the jurisdiction of this Commission, and if so, whether or not the defendant has violated any of the provisions of the Interstate Commerce Act or related statutes.

Id.

(5) Request was personally made for these records by two agents on October 5, 1977 and not complied with. *Id.*

As to the records listed in number (3) above, therefore, the ICC has satisfied the *Powell* test as well as the test of section 11144(b), discussed in Part (III)(A) *supra*.[17]

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17. Although the ICC also stated that the inquiry was authorized by 49 U.S.C. §304(a)(6) (now codified as §10321(a)-(b)), App.

3.

We turn now to Gould's more specific objection that the ICC was using its inspection power to gather evidence solely for a criminal investigation. The only support Gould has adduced for this charge is as follows:

(1) The ICC began negotiating with Gould for disclosure but then stopped negotiating and filed the injunctive action.

(2) The ICC agents commented that many or most agricultural cooperatives are illegal. App. at 111.

(3) An affidavit of one Roger Milliron stated that ICC agents admitted to Milliron that they were investigating Gould for criminal violations and transportation without ICC authority, *Id.* at 116.

(4) The ICC requested Gould's records with respect to the Harvest Moon Cooperative but failed to pursue the matter further. *Id.*

We have held that criminal purpose may not in any way be demonstrated by an agency's negotiation posture. *First National State*, 616 F.2d at 673; *Garden State*, 607 F.2d at 66 n.7. Nor are the statements or beliefs of mere agents relevant. *LaSalle*, 437 U.S. at 316; *First National State*, 616 F.2d at 673; *Garden State*, 607 F.2d at 73. Moreover, the fact that there may be a simultaneous criminal investigation will not negate the existence of a civil purpose. *First National State*, 616 F.2d at

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NOTE 17 — *(Continued)*

at 170, the failure to cite §11144(b) is not fatal, since *Powell* does not require explicit citation of the statutory basis for the inspection. It is clear from the other answers to the interrogatories and from the facts of the case that the inspection request was properly authorized under §11144(b).

672; *Garden State*, 607 F.2d at 74 & n.19. Finally, we can perceive no relevance whatsoever in the fact the ICC dropped its request for the Harvest Moon records.

4.

Accordingly, we conclude that the ICC has satisfied its burden of proof of a *prima facie* case of "good faith," and Gould has not demonstrated any bad faith in the ICC's purpose or any lack of compliance with procedural requirements.

C.

Nor is there merit to Gould's argument that the ICC's inspection request was too indefinite. The ICC did not know exactly what records Gould had. It requested "transportation-related records maintained by Gould in the course of his interstate transportation operations," App. at 101 (agent's affidavit), as further delineated by the ICC's answers to Gould's interrogatories, *see id.* at 173, *quoted supra*. Such a request is sufficiently specific to support enforcement under section 11144(b). *See Cooper's*, 330 F.2d at 341 (ICC "could not properly perform its duties if the regulated party had the right to say just how far an examination could go").[18]

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18. The *Cooper's* court affirmed a preliminary injunction ordering the business:

> "to submit all its accounts, books, records, memoranda, correspondence and other documents for inspection and copying, and submit all its lands, buildings and equipment for examination and inspection by duly authorized representatives of the Interstate Commerce Commission upon demand and display of proper credentials; and to desist from secreting, concealing, or destroying any accounts, books, records, memoranda, correspondence or other documents except as permitted by law."

330 F.2d at 340.

As a final matter, we note that Gould's defenses that the ICC had other possible sources for the information, that other parties should be joined, and that allowing inspection in this case would burden Gould's business unduly have no basis in either law or fact in resisting an enforcement proceeding under §11702(a)(4).

IV.

The final and most troublesome issue presented by this appeal is Gould's claim that the fifth amendment shields the records sought by the ICC. On the record as it now stands, it is undisputed that BACA is a sole proprietorship and that Gould is the sole proprietor of BACA. Insofar as this record reveals, Gould is the sole owner of the records the ICC wishes to inspect, and these records are in Gould's exclusive possession. Gould insists as well that his personal records are inextricably entwined and intermingled with BACA's business records.

In the case of *In re Grand Jury Empanelled February 14, 1978 (Colucci)*, 597 F.2d 851, 859-66 (3d Cir. 1979), we had occasion to review and distill the relevant fifth amendment precedents. We held in *Colucci* that a sole proprietor may not quash a grand jury subpoena for business records not in his possession.[19] In the present case we face a question not decided in *Colucci*, *see id.* at 860: may a sole proprietor deny a business records visitation inspection which is analogous in all respects to a business records subpoena addressed to *him*?[20] The present proceeding, however, requires answers to two secondary questions.

First, while recognizing that for other purposes (questions of jurisdiction and reasonableness, *see* Parts (II), (III) *supra*) the ICC inspection procedure is analogous to the subpoena-summons procedures of other

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19. The records in *Colucci* were physically in an employee's possession. We held, *inter alia*, that the employer could not claim constructive possession where the employee had prepared and maintained the records, the employee had access to them, they were business and not personal papers, and that consequently there could be no expectation of privacy.

20. There was no need to reach this issue in *Colucci*, since once the Government could obtain the same records from the employee, it had no more interest in obtaining the selfsame records from the employer-proprietor himself.

agencies where summary enforcement is provided, the first question that must be addressed is whether, in a fifth amendment context, the same analogy obtains. Or, is the inspection procedure of the ICC more analogous to a search and seizure, rather than the subpoena-summons procedure? As we shall discuss, the answer to this question must be furnished by the district court after an appropriate record has been developed.

Second, may Gould, rather than making a specific objection to the production of any particular document, assert a blanket fifth amendment defense to the production of all documents? We hold that he may not.

A.

It is a commonly held belief that the modern businessman has little or no expectation of privacy in his business records, especially those documents prepared in compliance with regulatory requirements. Commentators have consequently urged that fifth amendment protection be denied generally to business records. *See, e.g.*, 1 K.C. Davis, *supra*, §4:17, at 279; *Developments*, *supra* note 12, at 1286. Nevertheless, the governing law with respect to the fifth amendment protection afforded business records remains as it was succinctly restated in *Bellis v. United States*, 417 U.S. 85 (1974):

> It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd v. United States*, 116 U.S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633-635; *Wilson v. United States*, 221 U.S. 361,

> 377 (1911). The privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd v. United States*, *supra*; *Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969). As the Court explained in *United States v. White*, [322 U.S. 694, 698 (1944)], "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." *See also Curcio v. United States*, 354 U.S. 118, 125 (1957); *Couch v. United States*, *supra*, at 330-331.

417 U.S. at 87-88.

To be sure, the sweeping rule of *Boyd* has not survived the test of time entirely unscathed. *Bellis* itself, for example, noted that "an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally," *id.* at 88. *See generally id.* at 88-101 (discussing historical development of exclusion from fifth amendment coverage of business papers of organized institutional activity).[21]

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21. *Bellis* noted that landmark cases in this line include *Wilson* (corporate officer may not claim privilege with respect to corporate books); Wheeler v. United States, 226 U.S. 478 (1913) (same where corporation has been dissolved); Grant v. United States, 227 U.S. 74 (1913) (same where corporation had been dissolved, even if records were in possession of sole shareholder); *White* (privilege inapplicable to records of unincorporated association); and *Bellis* itself (same with respect to partnership, even where partnership has been dis-

Yet, where the records are not those of a collective entity, and are not held in a representative capacity, but are rather records of a individual proprietorship not separate or distinct from the sole proprietor, as Gould claims his records are here, then neither *Bellis* nor any case to date[22] holds that such records are without the individual proprietor's fifth amendment privilege.

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solved). *See In re* Witness Before the Grand Jury (Marlin), 546 F.2d 825, 827 (9th Cir. 1977) (same with respect to records of sole proprietorship that "were maintained by appellant's business and accounting staff in the same manner as the various joint venture accounts").

Although many of these cases rely on the absence of an expectation of privacy, this notion has always been related not to the business nature of the records but rather to the institutional character of the type of business organization involved. It is organized institutional activity, as distinct in nature from the sole proprietorship, that forfeits an expectation of privacy.

22. Fisher v. United States, 425 U.S. 391 (1976), allowed the Government to compel production of an *accountant's* workpapers — clearly business records — from the hands of the taxpayer or his attorney. *Fisher* explicitly left open one question:

> Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his "private papers". . . .

Id. at 414 (citation omitted). Technically, the reason for requiring production in *Fisher* was that the papers requested were not prepared by the party involved; so he "could not vouch for their accuracy. The documents could not be admissible in evidence against the taxpayer without authenticating testimony." *Id.* at 413. What the taxpayer in *Fisher* was doing — producing papers prepared by someone else — was not "testimonial" and hence did not merit fifth amendment protection. In *Colucci* we recognized this distinction as well when we held that if a sole proprietor had wrongfully usurped actual possession of records after his rights were frozen by service of a subpoena, the records could be seized from him because the testimonial authentication could be obtained from the employee who had had the records before. 597 F.2d at 865-66.

Just as *Fisher* allowed compulsion of action so long as the action was not "testimonial," in Andresen v. Maryland, 427 U.S. 463

B.

Thus, the question which we must now answer is whether, for fifth amendment purposes, the ICC inspection procedure resembles the subpoena-summons procedures of other agencies on the one hand or search and seizure procedures on the other. The answer to this question dictates whether Gould may claim the protection of the fifth amendment for his papers and records. As we have just indicated, under *Bellis* the fifth amendment may be asserted by a sole proprietor to shield the business records of his sole proprietorship, where there is no organized institutional activity. By contrast, the Supreme Court has held, in *Andresen v. Maryland*, 427 U.S. 463 (1976), that the fifth amendment affords no protection whatsoever against the search and seizure of business records. *See* note 22 *supra*.

NOTE 22 — *(Continued)*

(1976), the Court allowed a *seizure* pursuant to search warrant of incriminating business records, since the individual whose premises were searched was neither required to aid in the production of the records nor compelled to authenticate them. *Fisher* and *Andresen* have been viewed as illustrative of a shift over the past century from the formalist-absolutist approach of *Boyd* toward a more pragmatic and relativist vision of the fifth amendment, focusing on the manner and procedure by which evidence is obtained. Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 Harv. L. Rev. 945, 946-47, 975-78 (1977).

Yet, while *Fisher*, *Andresen*, *Bellis*, and the cases cited therein may well presage a trend toward elimination of the fifth amendment privilege for all business records, even when the proprietor is required to produce and thus implicity authenticate them, *see, e.g.*, *Andresen*, 427 U.S. at 486 (Brennan, J., dissenting); 1 K.C. Davis, *supra*, §4:17, at 279; *id.* §4:19, such a final break with *Boyd* is not for us to make. As we read the Supreme Court's most recent pronouncements, the fifth amendment still affords Gould, BACA's sole proprietor on the record we have before us, *see* Part I, *supra*, the same protection for BACA's business papers as he claims for his own personal papers.

As we have discussed in Parts (II) and (III) *supra*, with respect to questions of jurisdiction and reasonableness, the procedures employed by the ICC under section 11144(b) are the equivalent of the subpoena power of other agencies. When the ICC seeks an injunction under section 11702(a)(4) to allow it access to inspect records, the judicial inquiry with regard to jurisdiction and reasonableness is similar to that employed when another agency seeks enforcement of its subpoena or summons. Nevertheless, a separate examination of the ICC inspection procedures must be undertaken to determine, for fifth amendment purposes, whether these procedures more closely resemble those involved in subpoena or summons practices or whether they are closer to the practices involved in a search and seizure. If the statutory ICC inspection resembles a subpoena or a summons procedure in a practical sense, then *Bellis* would control, and Gould may assert a fifth amendment privilege, subject, of course, to our discussion in Part (IV)(C) *infra* rejecting a blanket assertion of the privilege. On the other hand, an ICC inspection which partakes of the character of a search and seizure would trigger the *Andresen* rule and thus foreclose assertion of Gould's fifth amendment privilege.

Our difficulty here is that the record before us does not provide us with the means by which we can determine on which side of the line the ICC inspection procedure falls,[23] since the district court granted summary judgment for the ICC without addressing this issue.[24] If

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23. Nor have we found any judicial or congressional discussion of this problem. We observe that *Midwest Growers* merely noted that the two modes of inspection — subpoena and visitorial — were equivalent, but did not discuss this equivalence in a fifth amendment context. *See* 533 F.2d at 461 & n.14.

24. The September 11, 1979 order, from which appeal is taken, recites findings of fact made by the district court. However, it then grants summary judgment to the ICC permanently enjoining Gould from, among other things, refusing to produce or to permit

ICC agents conducting an inspection actually require the proprietor or his agents to point out, segregate, assemble, or turn over certain documents or categories of documents for examination on the proprietor's premises, then we can perceive little difference between such a visitorial inspection and the summons-subpoena procedures, where documents are similarly produced by the individual having control over them. While it is true that in a visitorial inspection the inspectors examine the documents on the business premises, and in the summons-subpoena context the documents are examined off premises at a place designated by the government, we can find no significance, in a fifth amendment context, to this difference. In both cases, the proprietor would be required to designate and produce the documents. Thus, in both cases, compliance on the part of the proprietor could amount to having his testimony compelled.

If, on the other hand, ICC agents, in the conduct of a visitorial inspection, seek no aid or assistance from the

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NOTE 24 — *(Continued)*
access to his transportation-related records. We observe that the grant of summary judgment is incompatible with the resolution of disputed material facts. Sanford v. O'Neill, 616 F.2d 92, 96 (3d Cir. 1980). While in other circumstances, where a district court relied upon its own findings in determining the issues, we would have difficulty in sustaining a summary judgment, we are not faced with that situation on this record. Here, despite the inclusion of "findings of fact" in its September 11, 1979 order, the district court concluded that indeed there were no material disputes of fact. As we have indicated above, while the record discloses some disagreement with respect to matters not essential to the issues, the record also discloses that the material facts and the essential events and the manner of their occurrence are not controverted. The district court was thus faced, as are we, with pure questions of law concerning the issues of jurisdiction and reasonableness. In such a situation, we are not precluded from affirming an order of summary judgment, as we undoubtedly would have done here had not the fifth amendment issue required a remand for the district court to make findings of fact and an evidentiary record.

proprietor and do not ask for or require the designation or production of documents but rather through their own efforts attempt to locate the records they seek, the inspection would appear to lack any aspects of testimonial compulsion and could be analogized to a search and seizure.

We have obviously not attempted to catalog all of the features which are characteristic of the summons-subpoena procedures or which inhere in a search and seizure. This task and the development of an evidentiary record with appropriate findings of fact require that we remand this proceeding to the district court for its attention in the first instance. In this connection, it would appear to us that the ICC would have the burden of producing evidence of its own procedures, and Gould, who seeks to assert a fifth amendment privilege, would have the burden of proving that the ICC statutory inspection is for this purpose analogous to the service upon him of a subpoena or a summons with their attendant rights.

If the district court concludes that the ICC statutory inspection most closely resembles a legally conducted search and seizure, it should issue the injunction requested by the ICC, since *Andresen's* rationale would allow a seizure of personal papers as well as business documents. *United States v. Praetorius*, Nos. 79-1134, -1153 to -1155, 1164, -1169, -1183, slip op. at 5657-59 (2d Cir. Dec. 10, 1979).[25] If, on the other hand, the dis-

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25. The *Andresen* fact situation involved business records, and therefore, in a strict sense, the holding was limited to business records. But its stated rationale — that a search and seizure involves no "compulsion" violative of the fifth amendment's protection from being compelled to testify against oneself — seems to admit of no distinction based on the type or content of the documents seized. *See, e.g.*, 427 U.S. at 473-74 (dictum). *Praetorius* therefore denied fifth amendment protection where the defendant's passport was validly obtained by the Government. *Praetorius* confirms our belief that *Andresen* is not limited to business records. *Contra*, Brink v. DaLesio, 82 F.R.D. 664, 672 (D. Md. 1979). In passing, we observe

trict court concludes that the ICC procedure resembles most closely an agency subpoena, the ICC may be foreclosed from obtaining inspection of documents for which Gould is able to claim his fifth amendment privilege specifically, an issue to which we now address ourselves.[26]

C.

Gould made a blanket fifth amendment objection to compliance with the ICC request for an inspection of his records. Such a blanket citation of the privilege against self-incrimination will not suffice as a valid claim of the privilege. In *National Life Insurance Co. v. Hartford Accident & Indemnity Co.*, 615 F.2d 595, 596 (3d Cir. 1980), we recently held "that a witness in a civil proceeding may not invoke a blanket fifth amendment privilege prior to the propounding of questions." In *In re U.S. Hoffman Can Corp.*, 373 F.2d 622, 626-27 (3d Cir. 1967), we held that the officers of a bankrupt corpora-

NOTE 25 — *(Continued)*
that in *Praetorius* the distinction between "search" and "subpoena" was not relevant as it is in this case because there the passport was not in the defendant's own possession.

26. Although not raised specifically in Gould's brief, his answer to the complaint asserts fourth amendment protection against unreasonable searches and seizures. App. at 20. However, we fail to appreciate any fourth amendment issue in the context of our analysis. If Gould were to consent to the inspection there could be no fourth amendment objection. If Gould were to refuse consent, an injunction would then have to be obtained, since the ICC has no statutory authority to conduct warrantless searches without consent. *Midwest Growers*, 533 F.2d at 462-63. In fact, the ICC has no power even to obtain a search warrant; instead, it is remitted solely to obtaining an injunction to enforce its right of inspection. *Id.* at 463. Thus, we cannot foresee any issue of a warrantless search or any issue being raised as to the level of probable cause required for a warrant. And the showing of "reasonableness" required to obtain a court's injunction, *see* Part (III)(B) *supra*, appears to us to satisfy any fourth amendment concerns. *See Oklahoma Press*, 327 U.S. at 209, 215-16; *Brigadoon*, 480 F.2d at 1053-54; *Cooper's*, 330 F.2d at 340-41.

tion could not refuse to supply the information sought by a blanket invocation of fifth amendment privilege. Information and documents which "could not possibly be incriminating no matter how broadly the privilege is construed," *id.* at 672, could not be withheld. *Accord*, *United States v. Allshouse*, Nos. 79-2493, -2626, slip op. at 4-5 (3d Cir. , 1980) (specific assertions of privilege required to avoid complying with tax summons). These cases establish that Gould may claim fifth amendment protection, if the fifth amendment is applicable at all,[27] only for specific documents or categories of documents which he can demonstrate to the court might tend to incriminate him.

V.

We have determined that the October 5, 1977 inspection request by ICC agents was within the ICC's statutory jurisdiction and was procedurally proper as well. However, despite this holding, the fifth amendment issue which has been raised by Gould requires us to remand this case to the district court for additional proceedings.

If the ICC demonstrates that BACA is in fact not a sole proprietorship or that some person other than Gould has possession of BACA's records, then the injunction previously issued by the district court would be appropriate because under *Bellis* or *Colucci* respectively the fifth amendment would be inapplicable. *See* Part (IV)(A) *supra*.

If such is not the case, however, and Gould either proves, or the ICC concedes, that he, Gould, is the sole proprietor of BACA and the sole possessor of its records, and that consequently they are in fact one and the same, then if Gould persists in his fifth amendment claim the district court will be obliged to determine the validity of

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27. *See* Part (IV)(B) *supra*.

that claim in accordance with this opinion's discussion and holdings. Obviously, if Gould cannot establish a valid fifth amendment privilege, nothing herein contained would prevent the district court from entering an order identical to the September 11, 1979 order, which we now are obliged to vacate.

We will therefore vacate the September 11, 1979 order of the district court and remand to the district court for further proceedings not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX

The following is a partial table of approximate cross-references:

Current Codification	Interstate Commerce Act	Former Codification
49 U.S.C.A. (West Supp. 1980)		49 U.S.C.
§10321	§12(1)	§12(1)
§10321	§12(2)	§12(2)
§10321	§204(a)(6)	§304(a)(6)
§10321	§204(a)(7)	§304(a)(7)
§10526(a)(4)	§203(b)(5)	§303(b)(5)
§11144(a)	§20(5)	§20(5)
§11144(b)	§220(d)	§320(d)
§11144(c)	§220(g)	§320(g)
§11145(a)	§220(a)	§320(a)
§11701	§204(c)	§304(c)
§11702(a)(4)	§222(b)	§322(b)

Supreme Court, U. S.
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No. 80-403

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES R. GOULD, DOING BUSINESS AS BROKERS FOR AGRICULTURAL COOPERATIVE ASSOCIATIONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-403

JAMES R. GOULD, DOING BUSINESS AS BROKERS FOR AGRICULTURAL COOPERATIVE ASSOCIATIONS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

Petitioner contends that the court of appeals erred in upholding the statutory authority of the Interstate Commerce Commission to inspect records of transportation brokers claiming exemption from regulation.

1. Petitioner claims to be a sole proprietor acting as a broker of transportation services provided by agricultural cooperatives that are partially exempt from regulation by the Interstate Commerce Commission. Beginning in October 1977, Commission investigators made several oral and written requests to inspect petitioner's transportation-related business records pursuant to 49

U.S.C. (Supp. II) 11144(b).[1] After these requests were refused, the Commission brought this action in the United States District Court for the Western District of Pennsylvania, seeking an injunction to require petitioner to make the records available for inspection. Petitioner claimed that an injunction should not issue because: (a) his business is exempt from the jurisdiction of the Commission, which therefore lacked statutory authority to inspect the records; (b) the requests were made in bad faith; and (c) the records were protected by the Self-Incrimination Clause of the Fifth Amendment.[2] The district court granted summary judgment for the Commission.

2. On appeal, the court of appeals upheld the Commission's statutory authority to inspect petitioner's business records, despite petitioner's claim that his business is exempt from regulation (Pet. App. 6-13). The court also held that the Commission's inspection procedures were reasonable, that they had been carried out in good faith, and that they were consistent with this Court's decisions in *United States* v. *La Salle National Bank*, 437 U.S. 298 (1978), and *United States* v. *Powell*,

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[1]Section 11144(b) provides in pertinent part:

> The Commission, or an employee designated by the Commission, may on demand and display of proper credentials—
>
> (1) inspect and examine the lands, buildings, and equipment of a carrier, broker, or lessor; and
>
> (2) inspect and copy any record of—(A) a carrier, broker, lessor, or association; * * *

We refer in this memorandum to sections of the Interstate Commerce Act as recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Section 11144(b) was formerly codified at 49 U.S.C. 320(d).

[2]In the district court, petitioner also asserted that the investigation would violate his Fourth Amendment rights. Petitioner did not rely on that ground in the court of appeals, and he does not raise it here.

379 U.S. 48 (1964) (Pet. App. 14-25). Finally, the court found that the record provided an insufficient factual basis for deciding the merits of petitioner's Fifth Amendment claim. The court reasoned (Pet. App. 26-29) that the Commission's inspection procedures would not violate petitioner's Fifth Amendment rights if the procedures were essentially equivalent to a search and did not require petitioner's assistance in locating or identifying particular documents. See *Andresen* v. *Maryland*, 427 U.S. 463 (1976). If, on the other hand, the procedures required petitioner or his agents to "point out, segregate, assemble, or turn over certain documents" (Pet. App. 28), the court remarked that the procedures would be analogous to a subpoena and "the ICC may be foreclosed from obtaining inspection of documents for which [petitioner] is able to claim his fifth amendment privilege specifically * * *" (Pet. App. 30). See *Bellis* v. *United States*, 417 U.S. 85, 87-88 (1974). Because the record did not show whether the Commission's inspection procedures were more similar to a search than to a subpoena, the court remanded the case for further evidence as to the nature of the planned inspection (Pet. App. 31-32).

3. Petitioner does not contend here, as he did in the court of appeals, that the Commission lacks authority under 49 U.S.C. (Supp. II) 11144(b) to inspect his records. He now asserts (Pet. 11-18) only that the Commission was required by the Due Process Clause and the Administrative Procedure Act to afford him a hearing with respect to his jurisdictional claim before conducting the inspection, the very purpose of which is to determine jurisdiction. That contention, which is unsupported by authority, is insubstantial.

It is well established, as the court of appeals correctly held (Pet. App. 6-13), that an agency may use its statutory powers of investigation for the purpose of determining whether a particular business is subject to the agency's jurisdiction. See, *e.g.*, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 209-214 (1946); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 507-509 (1943); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F. 2d 1047 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974). Neither the Due Process Clause nor the Administrative Procedure Act[3] requires a hearing concerning jurisdiction before an agency may exercise those powers. The jurisdiction of the agency can always be challenged in the event that it ultimately seeks to enforce the substantive requirements of the statute. However, premature jurisdictional arguments should not be permitted to thwart the Commission's initial inquiries, which are essential to determining its jurisdiction. *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 213-214; *Endicott Johnson Corp.* v. *Perkins*, *supra*, 317 U.S. at 509; *SEC* v. *Brigadoon Scotch Distributing Co.*, *supra*, 480 F. 2d at 1052-1053.

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[3]Although petitioner now contends (Pet. 14-15) that the proposed inspection would violate the APA, that argument was not raised in the court of appeals and it therefore is not properly presented here. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Petitioner's contention, which rests on 5 U.S.C. 555(c), is insubstantial in any event because, as petitioner notes (Pet. 15), "it has been held many times that [that section's requirement that inspection be] * * * 'in accordance with law' does not give the court authority to determine the agency's jurisdiction over the individual from whom the information is subpoenaed * * *." See *Tobin* v. *Banks & Rumbaugh*, 201 F. 2d 223, 225-226 (5th Cir.), cert. denied, 345 U.S. 942 (1953). It is settled that an administrative subpoena will be enforced "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). Accord, *EEOC* v. *University of New Mexico*, 504 F. 2d 1296, 1302-1303 (10th Cir. 1974).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER 1980

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